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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMAAL DEANDRE THOMAS,

Defendant and Appellant.

2d Crim. No. B207602
(Super. Ct. No. MA037182-01)
(Los Angeles County)

Jamaal Deandre Thomas was convicted, by jury, of torture (Pen. Code, § 206),¹ kidnapping (§ 209), sexual penetration by a foreign object causing great bodily injury (§§ 289, subd. (a)(1), 12022.8), forcible rape (§ 261, subd. (a)(2)), and dissuading a victim or witness by means of force or threats. (§ 136.1, subd. (b)(1), (c)(1).) The trial court sentenced appellant to an indeterminate term of life with the possibility of parole for the torture conviction, to be served consecutively to an aggregate, determinate term of 26 years, 8 months for the remaining offenses.² This appeal challenges only the sentence

¹ All statutory references are to the Penal Code unless otherwise stated.

² The determinate term is calculated as follows: The trial court selected the sexual penetration count (count 7) as the principal term, elected to sentence appellant pursuant to section 667.6 rather than section 1170.1, and imposed the upper term of eight years plus a five-year great bodily injury enhancement. It imposed a consecutive term of one year, eight months (one-third the middle term) for the kidnapping and another consecutive

imposed for dissuading a victim or witness in violation of section 136.1. The trial court sentenced appellant, pursuant to section 1170.15, to "a mandated . . . midterm 4 years consecutive . . . " on that count. Appellant contends this was error because the middle term for the offense is three years. He further contends the sentence violated his due process and jury trial rights because he did not receive advance notice that section 1170.15 would apply and because factual issues relevant to the application of the statute were not submitted to the jury.

The People correctly concede that the trial court misstated the middle term for a violation of section 136.1. They request that we also modify the abstract of judgment to clarify that the sentence imposed for the section 289 conviction (count 2) runs consecutively to the other determinate terms. Only the first modification is required. Accordingly, we will modify the sentence imposed for dissuading a witness (count 11) to the correct middle term of three years. As so modified, the judgment is affirmed.

Facts

Because this appeal is limited to sentencing issues, we need not provide a detailed factual description of appellant's many offenses. For our purposes, it is enough to state that, beginning at about 6 p.m. on December 23, 2006, and continuing through the next morning, appellant savagely and repeatedly hit, kicked, choked, raped and sexually assaulted his then-fiancé, Julia S. Appellant took Ms. S. by force to three different locations, committing both physical and sexual assaults against her at each location. Ms. S. was able to break free from appellant several times, but each time he caught her and subjected her to even more abuse. Throughout this ordeal, appellant repeatedly told Ms. S. that he would kill her and her family if she reported his crimes.

Early on the morning of December 24, Ms. S. was able to get into a bedroom by herself and lock the door. From there, she called 911 and was able to tell the operator her location before the phone went dead. Appellant had disconnected the phone jack, which was in another room. Ms. S. jumped out of the bedroom window and ran

upper term of 8 years for the forcible rape. Finally, it applied section 1170.15 to impose a consecutive, full middle-term sentence for the violation of section 136.1.

from the house. Appellant caught her. As he forced her back into the house, appellant told Ms. S. that, if she had called the police, she would be dead before they arrived. Police officers arrived at the house within a few minutes. Appellant again threatened to kill Ms. S's family if she spoke to them. The officers searched the house, found Ms. S. hiding in the bathroom and rescued her.

Contentions

Appellant challenges only the trial court's imposition of a consecutive, full middle-term sentence on the dissuading count. He contends the trial court incorrectly stated the middle term for that offense, and that it violated his due process and jury trial rights by sentencing him pursuant to section 1170.15 without advance notice and without submitting factual issues to the jury. Only the first contention has merit.

Statutory Framework

Section 136.1, subdivision (b)(1) provides: "Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense . . . : [¶] (1) Making any report of that victimization to any peace officer" Subdivision (c) of the same statute establishes a sentencing range of two, three or four years if a person "knowingly and maliciously" violates subdivision (b) and the intimidating or dissuading act "is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person"

Section 1170.15 provides: "Notwithstanding subdivision (a) of Section 1170.1, which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of . . . the first felony . . . the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed, and shall include the full term prescribed for any enhancements imposed for being armed

with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury."

Jury Instructions

The trial court instructed the jury that, to find appellant guilty of violating section 136.1, it had to find: (1) that he "maliciously tried to prevent or discourage [Ms. S.] from making a report that she was a victim of a crime to Law enforcement;" (2) that Ms. S. was a witness or crime victim; and (3) that appellant "knew he was trying to prevent or discourage [Ms. S.] from reporting victimization and intended to do so." It further instructed that, "A person acts *maliciously* when he unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice." The trial court also instructed the jury that, if it found appellant guilty of the offense it, "must then decide whether the People have proved the additional allegations that the defendant acted maliciously and used or threatened to use force." The jury found appellant guilty and found that he maliciously used or threatened to use force.

Discussion

Section 1170.15 mandates that a consecutive full middle-term sentence be imposed for a felony violation of section 136.1 where the defendant is also convicted of committing another felony against the person he or she attempted to dissuade. Here, the trial court correctly imposed a consecutive full middle-term sentence, but erred when it stated that the length of the middle term was four years. The People concede the error. We agree: The middle term for a violation of section 136.1 is three years, rather than four. (§ 136.1, subd. (c)(1).) The abstract of judgment must be modified to reflect the correct middle term of three years. (*People v. Jones* (1998) 17 Cal.4th 279, 310.)

Appellant contends he was deprived of due process because he did not receive advance notice that the trial court would sentence him pursuant to section 1170.15. We are not persuaded. Appellant certainly has a due process right to advance notice of specific sentence enhancement allegations against him. (*People v. Mancebo* (2002) 27 Cal.4th 735, 747.) But section 1170.15 is not a sentence enhancement, it is an

alternative sentencing scheme. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1834.) Its application does not require the trial court to find any facts beyond those reflected in the jury's verdict. (*Blakely v. Washington* (2004) 542, U.S. 296, 303.) No additional notice was required.

A sentence enhancement is "an additional term of imprisonment added to the base term" for an offense. (Cal. Rules of Court, rule 4.405(3).) Enhancement statutes frequently use the term "enhancement" or expressly refer to an "additional term" that must be imposed. (*People v. Rayford* (1994) 9 Cal.4th 1, 9.) Typically, statutes provide for the imposition of a sentence enhancement where the facts of the offense or the criminal history of the defendant differ from those of other crimes and defendants in a way that " 'justifies a higher penalty than that prescribed for the offenses themselves.' " (*Id.*) In many instances, the statutes also require that these additional facts be specifically alleged and either admitted by the defendant or found true by a jury. (See, e.g., *People v. Mancebo, supra*, 27 Cal.4th at pp. 744-745.)

None of these features is present in section 1170.15. The statute does not refer to itself as an "enhancement," nor does it provide for the imposition of any "additional term" of imprisonment. It does not add time to the base term for dissuading a witness; it authorizes imposition of that full term. In addition, section 1170.15 applies without regard to the defendant's criminal history or the specific facts of the offenses. It applies whenever a jury finds a defendant guilty of a felony and of dissuading a victim of, or witness to that felony. Thus, application of the statute does not depend on factual findings in addition to, or different from those made by the jury. We conclude that section 1170.15 creates a sentencing scheme that is an alternative to section 1170.1 and that, as such, it does not expose a defendant to a greater punishment than that authorized by the jury's verdict. As a result, due process did not require advance notice that section 1170.15 would be applied.

Nor did the trial court violate appellant's Sixth Amendment right to a jury trial. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury "

(*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) The right to a jury trial extends to "any fact that exposes a defendant to a greater potential sentence[.]" (*Cunningham v. California* (2007) 549 U.S. 270, 281), than the sentence "a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely v. Washington, supra*, 542 U.S. at p. 303, italics omitted.) The decision to impose consecutive, rather than concurrent terms for multiple convictions is one in which historically juries have played no part. Accordingly, the United States Supreme Court recently held that the Sixth Amendment does not mandate a jury trial on facts "declared necessary to the imposition of consecutive, in lieu of concurrent, sentences[.]" (*Oregon v. Ice* (2008) 172 L.Ed.2d 517, 522.) Our California Supreme Court came to the same conclusion in *People v. Black* (2007) 41 Cal.4th 799, where it held that "imposition of consecutive terms . . . does not implicate a defendant's Sixth Amendment rights." (*Id.* at p. 821.)

Oregon v. Ice, supra, and *People v. Black, supra*, control the result here. We hold the trial court did not violate appellant's jury trial rights when it applied section 1170.15 to impose a consecutive, full middle term on the dissuading count. Imposing this sentence did not require the trial court to make factual findings beyond those reflected in the jury's verdict. The jury found that appellant committed multiple felonies against Ms. S., the only alleged victim. It further found that appellant "maliciously tried to prevent or discourage" her from reporting "that she was a victim of a crime[.]" and that appellant "knew he was trying to prevent or discourage [Ms. S.] from reporting victimization and intended to do so." These findings, without more, triggered application of section 1170.15. There was no violation of appellant's Sixth Amendment rights.

The People request that we also modify the abstract of judgment to reflect that the sentence imposed on count 7, for violating section 289, runs consecutively to the other determinate terms. No modification is necessary. The trial court designated count 7 as the principal term, imposed the upper term of 8 years plus a 5-year great bodily injury enhancement, and ordered that each of the remaining determinate terms run consecutively to the principal term. It also ordered that the indeterminate life term

imposed on the torture count be served consecutively to the entire determinate term. The abstract of judgment accurately reflects these orders.

Disposition

The judgment is modified to impose a full middle term of three years on the dissuading count (count 11), with the sentence running consecutively to the other determinate terms imposed. As so modified, the judgment is affirmed. The clerk of the trial court will prepare and forward to the Department of Corrections an amended abstract of judgment incorporating the modification.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Lisa Chung, Judge
Superior Court County of Los Angeles

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